(1)

Supreme Court, U.S.
FILED

01 359 AUG 27 2001

OFFICE OF THE CLERK

No. 01-

In The
SUPREME COURT OF THE UNITED STATES

LORI A. SAFRIT,
Petitioner,
v.
CONE MILLS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

NANCY R. GAINES*
P.O. Box 4118
121 W. Council Street
Salisbury, NC 28145-4118
(704) 633-1723

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Paul Alan Levy
Public Citizen Litigation Group
1600-20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

*Counsel of Record

33 pp

QUESTION PRESENTED

Does a collective bargaining agreement which forbids violations of Title VII of the 1964 Civil Rights Act and states that violations of that provision of the agreement are subjects for arbitration create a legally enforceable bar to private civil actions under Title VII by employees covered by the agreement?

PARTIES

The parties to this proceeding are set forth in the caption.

TABLE OF CONTENTS

Page

Question Presented i

Parties ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutes Involved 1

Statement of the Case 2

Reasons for Granting the Writ 5

I. This Case Presents An Important Question of Law About Which the Courts of Appeals Are Divided and Which This Court Previously Granted Certiorari to Resolve in *Wright v. Universal Maritime Service Corp.* 5

II. Certiorari Should Be Granted to Resolve The Tension Between *Alexander v. Gardner-Denver* and *Gilmer v. Interstate/Johnson Lane Corp.* And To Clarify The Meaning of *Wright*. 13

Conclusion 16

Appendix

Opinion of the Court of Appeals (April 27, 2001). 1a

Memorandum Opinion of the District Court (November 9, 1999) 6a

TABLE OF AUTHORITIES

CASES

Air Line Pilots Association, International v. Northwest Airlines, Inc., 199 F. 3d 477(D.C.Cir. 1999)..... 13

Albertson's, Inc. v. United Food and Commercial Workers Union, 157 F. 3d 758(9th Cir. 1998)..... 11

Arslanian v. Oakwood United Hospitals, Inc., 240 Mich. App. 540, 618 N.W. 2d 380(Mich. Ct. App. 2000)..... 13

Austin v. Owens-Brockway Glass Container, Inc., 78 F. 3d 875 (4th Cir. 1996)..... passim

Bratten v. SSI Services, Inc., 185 F. 3d 625 (6th Cir. 1999)..... 9

Brisentine v. Stone & Webster Engineering Corp., 117 F. 3d 519(11th Cir. 1997)..... 12, 14

Brown v. ABF Freight Systems, Inc., 183 F. 3d 319, 321 (4th Cir. 1999)..... 7, 15

Carson v. Giant Food, Inc., 175 F. 3d 325, 331 (4th Cir. 1999)..... 7, 15

Circuit City Stores, Inc. v. Adams, — U.S. —, 121 S.Ct. 1302 (2001)..... 6

Doyle v. Raley's Incorporated, 158 F. 3d 1012,(9th Cir. 1998)..... 11

Duffield v. Robertson Stephens & Co., 144 F. 3d 1182(9th Cir.)..... 11

Gingles v. Bethlehem Steel Corp., 145 F. 3d 1324 (table), 1998 WL 196606 (4th Cir.)..... 7

Harrison v. Eddy Potash, Inc.,
112 F. 3d 1437,(10th Cir. 1997)..... 12

Johnson v. Bodine Electric Co.,
142 F. 3d 363,(7th Cir. 1998) 10

Penny v. United Parcel Service,
128 F. 3d 408 (6th Cir. 1997) 8, 9

Pryner v. Tractor Supply Co.,
109 F. 3d 354(7th Cir. 1997) 9, 10, 14

Quint v. A.E. Staley Mfg. Co.,
172 F. 3d 1(1st Cir. 1999)..... 13

Robinson v. Healthtex, Inc., 215 F. 3d 1321 (table), 2000 WL
691053 *3 (4th Cir. 2000) 15

Rogers v. New York University,
220 F. 3d 73(2d Cir. 2000) 8

Tran v. Tran,
54 F. 3d 115 (2d Cir. 1995) 8

Torrez v. Consolidated Freightways Corp. of Delaware, 58 Ca.
App. 4th 1247, 68 Cal. Rptr. 792 (6th Dist. 1997)..... 13

Varner v. National Super Markets, Inc.,
94 F. 3d 1209(8th Cir. 1996). 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lori A. Safrit respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on April 27, 2001.

OPINIONS BELOW

The April 27, 2001 opinion of the Court of Appeals, which is reported at 248 F. 3d 306 (4th Cir. 2001), is set out at pp. 1a - 5a of the Appendix to this petition. The November 9, 1999 memorandum opinion of the district court, which is reported at 1999 WL 1111516, is set out at pp. 6a – 11a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on April 27, 2001. On July 9, 2001, the Chief Justice granted an extension of time for the filing of the petition until August 27, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

STATUTES INVOLVED

Section 706(f) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-5(f), provides in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency,

> or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

At the time when this litigation arose petitioner was employed at Cone Mills' plant in Salisbury, North Carolina. She was also a member of the United Needletrades, Industrial and Textile Employees Union, which represented workers at that plant.

In 1994 petitioner became a fixer trainee. She was the only female employee in that group of trainees. She alleged that Cone Mills failed to provide her with proper training and denied her job opportunities that were afforded to male trainees. She contended that Cone Mills had engaged in this discriminatory action because petitioner was a woman.

The collective bargaining agreement (CBA) in effect at the plant specifically forbade both the company and the union to discriminate on the basis of sex, and the company and union further agreed to comply with "all the requirements of Title VII of the Civil Rights Act of 1964." The collective bargaining agreement established a four step grievance process, and stated that "[un]resolved grievances . . . are the proper subjects for

arbitration."[1] Under the CBA neither Safrit nor any other individual employee had a right to pursue a grievance or seek arbitration; only the union itself was authorized to do so.

Petitioner initially took her sex discrimination claim to the union, which filed a grievance. The matter proceeded through the fourth step of the grievance process, at which point the company agreed to provide petitioner with additional time to train as a fixer. Petitioner accepted that offer. Despite that agreement, however, the discrimination resumed, and petitioner did not continue in the fixer program.

Petitioner again complained to the union, but the union declined to file a grievance about these new discriminatory practices. Instead, the union advised petitioner that if she wanted to stop the alleged discrimination she should retain an attorney and file suit under Title VII. Because the union chose to not even file a first step grievance, the possibility that the union would seek arbitration never arose.

Petitioner commenced this action in 1997 in the United States District Court for the Middle District of North Carolina. The company moved to dismiss, insisting that the remedies provided by the collective bargaining agreement were the sole method of enforcing Title VII, and that the agreement

---

[1]The full text of Section XX of the agreement was as follows:

> "The Company and the Union agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability. this includes, but is not limited to, all phases of employment, benefits, hiring, placement, rates of pay, upgrading, layoff, demotion, and termination. The parties further agreed that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964 and Executive Orders 11246 and 11375.
>
> Arbitration. Unresolved grievances arising under this Section are the proper subject for arbitration."

negotiated by the union had waived prospectively the rights of union members to seek judicial enforcement of Title VII. Controlling Fourth Circuit precedent held that a collective bargaining agreement could waive an employee's right to seek judicial relief. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F. 3d 875 (4th Cir. 1996). While the motion was pending, certiorari had been granted in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), to decide resolve a conflict between *Austin* and decisions to the contrary in several other circuits. The district court in the instant case therefore stayed proceedings in the litigation pending this Court's decision in *Wright*.

This Court's 1998 decision in *Wright*, however, did not resolve whether a collective bargaining agreement requiring arbitration of discrimination claims would be legally enforceable against an individual employee. Rather, *Wright* concluded that any CBA requirement to arbitrate "must be particularly clear", 525 U.S. at 79, and that the CBA in that case lacked the requisite clarity. 525 U.S. at 80-82.

In the wake of this Court's decision in *Wright*, the district court held that the collective bargaining agreement in this case "clearly and unmistakably provides that any claim of gender discrimination is subject to arbitration." (App. 9a). The district court upheld the enforceability of that asserted waiver, relying on post-*Wright* Fourth Circuit decisions reasserting that circuit's adherence to *Austin*. (App. 8a). In this case the decision not to file a grievance, let alone seek arbitration, had been made by the union; the district court held that in such a situation an employee might have a claim against the union, but only if she could show that the union itself acted with a discriminatory motive. (App. 10a).

The Fourth Circuit affirmed. Relying on *Austin* and its Fourth Circuit progeny, the court of appeals held that a union could bargain away an employee's right to judicial enforcement

of Title VII, could agree with the employer that only the union--and not the individual worker--could invoke the substitute remedies provided by the collective bargaining agreement, and could then decline to pursue those remedies even though a worker alleged she was the victim of unlawful gender based discrimination. In such circumstances, as here, the employee would not be accorded any forum whatever--in court, in grievance proceedings, or in arbitration--in which to seek redress for the alleged discrimination by the employer. The sole remedy available to petitioner under the Fourth Circuit's decision is an action against the union, if it violated its duty of fair representation.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT WHICH THE COURTS OF APPEALS ARE DIVIDED AND WHICH THIS COURT PREVIOUSLY GRANTED CERTIORARI TO RESOLVE IN *WRIGHT V. UNIVERSAL MARITIME SERVICE CORP.*

Three years ago this Court granted certiorari in *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998), to decide whether a collective bargaining agreement can impose on employees subject to that agreement a legally enforceable obligation to seek arbitration rather than utilize civil actions to assert their rights under federal civil rights statutes. The Court did not resolve that question in *Wright*, concluding instead that the collective bargaining agreement at issue in that case did not in fact require the employee involved to arbitrate his discrimination claims. 525 U.S. at 79-82.

Certiorari was warranted in *Wright* because in 1998 there was a clear conflict among the circuits regarding the enforceability of collective bargaining agreements which purport to require employees to submit federal civil rights claims to arbitration. Only the Fourth Circuit had held that

such agreements were enforceable; several circuits had squarely rejected the legality of such bars to judicial relief for violations of federal anti-discrimination statutes. (Petition for Writ of Certiorari, No. 97-889, pp. 9-10). As the United States observed at the time,

> [e]very other court of appeals to have reached the issue since *Gilmer[v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)] has concluded that *Alexander [v. Gardner-Denver Co.*, 415 U.S. 36 (1974)] continues to preclude waiver in a collective bargaining agreement of an individual's substantive or procedural rights under federal anti-discrimination statutes.

(Brief for the United States, No. 97-889, p. 11)(citing cases in the Second, Sixth, Seventh, Eighth, Tenth and Eleventh circuits).

Today the Fourth Circuit remains the only court of appeals that will enforce against individual employee plaintiffs collective bargaining agreements that purport to require arbitration of such anti-discrimination claims; the number of courts of appeals which emphatically reject this view has grown. The importance of this issue has been substantially increased by this Court's recent decision in *Circuit City Stores, Inc. v. Adams*, — U.S. —, 121 S.Ct. 1302 (2001). *Circuit Cities* resolved the question that was unresolved at the time of *Wright* as to whether the Federal Arbitration Act is generally applicable to employment contracts. See *Wright*, 525 U.S. at 78 n. 1.

The minority rule followed by the Fourth Circuit stems from that court's decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F. 3d 875 (4th Cir. 1995), *cert. denied* 519 U.S. 980 (1996). *Austin* insisted that a union could bargain away an employee's right to judicial enforcement of Title VII,

and could--in return for other concessions an employer might offer--require discrimination victims to take their complaints to arbitration. 78 F. 3d at 885. This Court had earlier held that employment discrimination victims cannot be required to utilize grievance procedures established by collective bargaining agreements. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). But *Austin* insisted that *Gardner-Denver* had been overturned by this Court's subsequent decision in *Gilmer v.Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which *Austin* concluded "rejects the principal concern in *Gardner-Denver*" about the such compulsory arbitration. 78 F. 3d at 880.

The Fourth Circuit relied on *Austin* to dismiss federal employment discrimination claims in *Wright v. Universal Maritime Service Corp.*, 121 F. 3d 702 (4th Cir 1997)(Americans With disabilities Act) and *Gingles v. Bethlehem Steel Corp.*, 145 F. 3d 1324 (table), 1998 WL 196606 (4th Cir.)(Title VII). Following this Court's decision in *Wright*, the Fourth Circuit reiterated its continued adherence to *Austin* in *Carson v. Giant Food, Inc.*, 175 F. 3d 325, 331 (4th Cir. 1999)(Americans With Disabilities Act and Age Discrimination in Employment Act), and *Brown v. ABF Freight Systems, Inc.*, 183 F. 3d 319, 321 (4th Cir. 1999)(Americans With Disabilities Act). In the instant case the Fourth Circuit again applied the holding in *Austin*, emphasizing that it constituted "binding fourth Circuit case law" regarding the enforceability of collective bargaining agreements that make arbitration the exclusive remedy for violations of federal employment discrimination laws. (App. --a).

Most other courts of appeals have emphatically disapproved of the holding in *Austin*. The Second Circuit recently noted the overwhelming rejection of *Austin*:

> [M]ost lower courts have focused on the party negotiating the waiver of rights. When the

> arbitration provision has been negotiated by a union in a CBA, these courts have held that *Gardner-Denver* applies. The Second Circuit is no exception. *See Tran v. Tran*, 54 F. 3d 115, 117-18 (2d Cir. 1995)(. . . conclud[ing] that employer could not compel union employee to arbitrate federal statutory claims even though CBA required arbitration). Only the Fourth Circuit has concluded otherwise. *See Austin v. Owens-Brockway Glass Container, Inc.* . . . .

Rogers v. New York University, 220 F. 3d 73, 75 (2d Cir. 2000)(footnote omitted), cert. denied sub nom. *New York University v. Rogers*, 121 S.Ct. 626 (2000); *see* 220 F. 3d at 75 n. 1 (citing cases in the Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia circuits rejecting the *Austin* rule).

The Sixth Circuit has expressly rejected *Austin* both before and after this Court's decision in *Wright*. In *Penny v. United Parcel Service*, 128 F. 3d 408 (6th Cir. 1997), that court of appeals reversed a district court decision that had relied on *Austin*.

> We believe this case is controlled by *Gardner-Denver* rather than by *Gilmer*. . . . [T]he divided panel of the Fourth Circuit that decided *Austin* concluded that the "old law" of *Gardner-Denver* was no longer controlling. . . . *Austin* has not inspired many followers. . . . [D]ecisions [in the Second, Seventh, Eighth, Tenth and Eleventh Circuits rejecting *Austin*] display more fidelity to the Supreme Court's holdings in *Gardner-Denver* and *Gilmer* than does *Austin*. . . . [A]lthough *Gilmer* permits an *individual* to waive his prerogative to pursue a statutory right in a judicial forum, that case does

> not alter *Gardner-Denver's* holding that a labor union cannot make such a waiver prospectively on an individual's behalf.

128 F. 3d at 412-13 (Emphasis in original). Subsequent to this Court's decision in *Wright* the Sixth Circuit reiterated this position.

> *Penny* fully set forth the oft-repeated reasons why *Austin*'s analysis was unsound . . . . Even if we had not already decided *Penny*, we would reach the same conclusion because the Supreme Court's recent decision in *Wright* implicitly overruled *Austin* anyway.

Bratten v. SSI Services, Inc., 185 F. 3d 625, 630 (6th Cir. 1999).

In the Seventh Circuit Judge Posner pointedly noted the inter-circuit conflict about this issue.

> Both sides of these appeals . . . are able to cite a case or two that squarely support their position--cases that really do not differ in any material particular from the present one--but in doing so all they have done is identify a circuit split. Compare *Austin v. Owens-Brockway Glass Container, Inc.*, . . . with *Varner v. National Super Markets, Inc.*, 94 F. 3d 1209, 1213 (8th Cir. 1996).

Pryner v. Tractor Supply Co., 109 F. 3d 354, 363 (7th Cir. 1997), cert. denied sub nom. *Tractor Supply co. v. Pryner*, 522 U.S. 912 (1997). The Seventh Circuit stressed the need for a final resolution by this Court of the questions raised by these cases.

> On balance our case is closer to *Alexander*; but is enough left of *Alexander* to compel a

> decision in favor of plaintiff? Only the Supreme Court can answer that question; and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so.

109 F. 3d at 365. Absent further guidance from this Court, the Seventh Circuit held that "the union cannot consent *for* the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery." 109 F. 3d at 363 (Emphasis in original). More recently, the Seventh Circuit noted that decisions in the Second, Sixth, Eighth, Tenth and Eleventh circuits had reached the same conclusion.

> [M]ost circuits agree with the result in *Pryner*. [Citing cases] . . . Only the Fourth Circuit has held that a CBA arbitration clause can bar an individual worker's Title VII claim. See *Austin v. Owens-Brockway Glass Container, Inc.*, . . . We therefore see no need to reevaluate *Pryner*.

Johnson v. Bodine Electric Co., 142 F. 3d 363, 366-67 (7th Cir. 1998)(footnote omitted).

The Ninth Circuit has disagreed with *Austin* in particularly strong language:

> There is a . . . troubling case . . . that conflicts directly with *Gardner-Denver*. See Austin *v. Owens-Brockway Glass Container, Inc.* . . . . In that case . . . the Fourth Circuit in fact flatly rejected *Gardner-Denver*, which in our view circuit courts are not free to do. . . . The Fourth Circuit also ignored the reasoning of eight Justices on the subject of statutory analysis . . . and . . . decided to disregard the legislative history of the 1991 Civil Rights Act. . . . We

> respectfully conclude that the Fourth Circuit simply misconstrued controlling law.

Duffield v. Robertson Stephens & Co., 144 F. 3d 1182, 1192 (9th Cir.), cert. denied 525 U.S. 982 (1998). In subsequent opinions that circuit has emphasized that the rule in the Fourth Circuit conflicts with decisions in the Ninth and seven other circuits.

> Since the decision in *Gilmer*, other circuits, with only one exception, have held that an employee has the right to sue under the FLSA, as well as other statutes, without having to resort to the collectively bargained grievance-arbitration procedures. [Citing cases] . . . *But see Austin v. Owens-Brockway Glass Container, Inc.*.

Albertson's, Inc. v. United Food and Commercial Workers Union, 157 F. 3d 758, 761-62 (9th Cir. 1998), cert. denied 528 U.S. 809 (1999).

> The majority of our sister circuits have held that collective bargaining agreements do not waive an individual employee's right to sue for statutory discrimination claims. [Citing cases] . . . *But see Austin v. Owens-Brockway Glass Container, Inc.* . . . [I]n *Duffield v. Robertson, Stephens & Co.* . . . we rejected the Fourth Circuit's view.

Doyle v. Raley's Incorporated, 158 F. 3d 1012, 1015 n. 3 (9th Cir. 1998).

The Tenth, Eleventh and District of Columbia Circuits, recognizing the inter-circuit conflict, have also rejected the Fourth Circuit's position.

> Since *Gilmer*, employer/defendants have argued that *Gilmer* effectively overruled *Alexander* . . . . To date, only the Fourth Circuit has accepted this argument, *Austin v. Owens-Brockway Glass Container*, . . . while the majority view is that *Alexander* and its progeny "remain good law and that statutory employment claims are independent of a collective bargaining agreement's grievance and arbitration procedures." . . . [Citing cases] . . . [W]e adopt the majority view.

Harrison v. Eddy Potash, Inc., 112 F. 3d 1437, 1453-54 (10th Cir. 1997), cert. denied 524 U.S. 947 (1998).

> [T]his case is like *Alexander* and unlike *Gilmer*. It may be that the Supreme Court has cut *Alexander* back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of *Alexander*. We will leave that to the Supreme Court . . . In applying *Alexander* instead of *Gilmer* to collective bargaining agreements, we follow the Seventh, Eighth, and Tenth Circuits. [Citing cases] . . . We disagree with the result and reasoning of the Fourth Circuit, which reached the opposite conclusion. *See Austin*.

Brisentine v. Stone & Webster Engineering Corp., 117 F. 3d 519, 525-26 (11th Cir. 1997).

> ALPA suggests that *Gilmer* "effectively supersedes" *Gardner-Denver* and permits a union to waive the employees' right to a judicial forum for statutory claims. The Fourth Circuit . . . agree[s], see *Austin v. Owens-Brockway*

> *Glass Container, Inc.*, . . . prematurely we think.
>
> . . . [W]e do not understand the Court in *Gilmer* to have overruled *Gardner-Denver*. . . . We see a clear rule of law emerging from *Gardner-Denver* and *Gilmer*: Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him. All of the circuits to have considered the meaning of *Gardner-Denver* after *Gilmer*, other than the Fourth, are in accord with this view. . . . [A] union may not use the employee's individual statutory right to a judicial forum as a bargaining chip to be exchanged for some benefit to the group.

Air Line Pilots Association, International v. Northwest Airlines, Inc., 199 F. 3d 477, 484 (D.C.Cir. 1999), *rehearing en banc granted* 199 F. 3d 477 (D.C.Cir. 1999), *judgment reinstated* 211 F. 3d 1312 (D.C.Cir. 2000), cert. denied 121 S.Ct. 565 (2000).[2]

---

[2]The First Circuit has gone even further, reading *Wright* to have expressly rejected the holding in *Austin*. *Quint v. A.E. Staley Mfg. Co.*, 172 F. 3d 1, 9 (1st Cir. 1999).

Several state courts have noted the conflict between the Fourth circuit and most other circuits on this issue. E.g., *Arslanian v. Oakwood United Hospitals, Inc.*, 240 Mich. App. 540, 547, 618 N.W. 2d 380, 383 (Mich. Ct. App. 2000)("Those courts finding to the contrary of *Austin*, some explicitly rejecting its reasoning, are numerous. . . . We agree with this vast majority of courts"); *Torrez v. Consolidated Freightways Corp. of Delaware*, 58 Ca. App. 4th 1247, 1249-50, 68 Cal. Rptr. 792, 793-94 (6th Dist. 1997)("Since *Austin*, virtually every court that has considered the issue has disagreed. In lengthy analyses, these courts have explained that the *Austin* majority misinterpreted the United States Supreme Court precedents . . . . [W]e join the growing chorus of cases rejecting *Austin's*

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE TENSION BETWEEN *ALEXANDER V. GARDNER-DENVER* AND *GILMER V. INTERSTATE/JOHNSON LANE CORP.* AND TO CLARIFY THE MEANING OF *WRIGHT*

This division among the courts of appeals derives in part from the differing implications of the decisions of this Court. As this Court explained in Wright, whether a CBA can deny employees access to a federal judicial forum:

> [B]rings into question two lines of our case law. The first is represented by *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII . . . if "he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement." 415 U.S. at 49. . . . The second line of cases implicated here is represented by *Gilmer v. Interstate/Johnson Law Corp.* . . . . which held that a claim brought under the Age Discrimination in Employment Act . . . could be subject to compulsory arbitration. . . . There is obviously some tension between these two lines of cases.

Wright v. Universal Maritime Service Corp., 525 U.S. at 75-76. As Judge Posner noted in *Pryner* and the Eleventh Circuit recognized in *Brisentine*, only this Court can clarify the relationship between these two lines of cases.

---

reasoning.")(Footnote omitted).

In addition, this case highlights an important ambiguity in the language of *Wright* itself. *Wright* holds that "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." 525 U.S. at 80. But that decision characterizes in several quite different ways *what* must be "clear and unmistakable." *Id.*. In its broader formulation *Wright* insists that "any CBA requirement to arbitrate . . . must be particularly clear." 525 U.S. at 79. This formulation of the rule in *Wright* was assuredly not meant here. The language of the CBA in this case merely *permits*, but does not require, resort to arbitration. "Unresolved grievances arising under [the section incorporating Title VII] are the proper subjects for arbitration." (App. 4a). This provision cannot plausibly be said to require with unmistakable clarity, or indeed even arguably to require at all, arbitration of such grievances.

A footnote in *Wright*, on the other hand, suggested that the opinion required that "a CBA clearly encompasses employment-discrimination claims." 525 U.S. at 82 n. 2. The CBA in this case, although not requiring arbitration (explicitly or at all), does contain the express language--found lacking in *Wright*--incorporating into the CBA the commands of Title VII. The courts below read the unmistakable clarity rule in *Wright* to require only a specific and unambiguous commitment to compliance with Title VII. (App. 4a). This is the fourth time since 1999 that the Fourth Circuit has held that an express reference to a federal anti-discrimination statute is sufficient without more to satisfy the unmistakable clarity requirement of *Wright*.[3] Only this Court can definitively resolve this question about the meaning of *Wright*.

---

[3]*Robinson v. Healthtex, Inc.*, 215 F. 3d 1321 (table), 2000 WL 691053 *3 (4th Cir. 2000); *Brown v. ABF Freight Sys., Inc.*, 183 F. 3d 319, 321 (4th Cir. 1999); *Carson v. Giant Food, Inc.*, 175 F. 3d 325, 331 (4th Cir. 1999).

The questions raised by this case are of enduring importance. The volume of litigation in the lower courts about this problem amply attests to the large number of litigants whose rights and remedies turn on a resolution of the issue left unresolved in *Wright*.

More fundamentally, the differences that persist in the wake of *Wright* leave unions and employers uncertain as to the legal significance of the countless collective bargaining agreements negotiated each year. The union officials in *Wright* itself did not understand their CBA to preclude their members from resort to federal courts; to the contrary, the president of Local 1422 of the International Longshoreman's Association, AFL-CIO, although strongly objecting to the employer's actions, did not file a grievance, but instead advised Mr. Wright to file suit under the Americans With Disabilities Act.[4] In the instant case the union , rather than pursuing remedies available to it under the CBA, also advised petitioner to file suit under Title VII. It is inconceivable that union officials involved--unless proceeding in extraordinary bad faith--would have advised their members to file suit if they had understood the CBA in question to assure the failure of that tactic. In both cases the decision of the Fourth Circuit gave to the CBA a meaning that the parties to that CBA--or at least the union in question--never intended. The integrity of the collective bargaining process requires a definitive decision from this Court making clear to union negotiators (and members) whether, and if so when, the terms of a CBA will have the effect of stripping union members of their access to a federal judicial forum.

---

[4]Brief for Petitioner, No. 97-889, pp. 3-4.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

NANCY R. GAINES
P. O. Box 4118
121 W. Council Street
Salisbury, NC 28145-4118
(704) 633-1723

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

PAUL ALAN LEVY
Public Citizen Litigation Group
1600 – 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

*Counsel of Record

United States Court of Appeals,

Fourth Circuit.

LORI A. SAFRIT, Plaintiff-Appellant,

v.

CONE MILLS CORPORATION, Defendant-Appellee.

No. 99-2677.

Argued Dec. 7, 2000.

Decided April 27, 2001.

ARGUED: Nancy Renee Gaines, Salisbury, NC, for Appellant. Donald Ross Hamilton, Jr., Haynsworth, Baldwin, Johnson & Greaves, L.L.C., Greensboro, NC, for Appellee. **ON BRIEF:** James M. Powell, Haynsworth, Baldwin, Johnson & Greaves, L.L.C., Greensboro, NC, for Appellee.

Before WILKINSON, Chief Judge, TRAXLER, Circuit Judge, and James C. CACHERIS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

The issue in this case is whether a plaintiff can proceed with a Title VII claim in federal court in the face of a Collective Bargaining Agreement which explicitly states that Title VII claims would be subject to binding arbitration. In accordance with our precedent and the Supreme Court's recent reaffirmation of the validity of arbitration for employment disputes, we affirm the judgment of the district court that plaintiff's claim is subject to arbitration.

I.

Lori Safrit was employed at Cone Mills' plant in Salisbury, North Carolina since 1982. She was a member of

the United Needletrades, Industrial, and Textile Employees Union (UNITE) during her employment. In November 1994, she became a fixer trainee. She was the only female fixer in her class. The defendant allegedly failed to train Safrit properly and denied her job opportunities available to other trainees.

The Collective Bargaining Agreement gave the union, not the employee, the exclusive option to proceed to arbitration. The CBA provided a four-step grievance procedure. If the complaint was still unresolved after the four steps, the CBA allowed for arbitration. Safrit could not proceed at any level without the union. The union took her case to the fourth step of the grievance process. At this point, Cone Mills agreed to correct the earlier deficiencies in the training program. This corrective measure caused the union to stop pursuing the grievance.

Cone Mills allegedly continued to discriminate against Safrit after the company reached the agreement with the union to correct the deficiencies in the training program. Safrit returned to the union to seek enforcement of the previous agreement and a remedy for the continuing discrimination. The union advised Safrit to seek legal counsel to pursue remedies outside the grievance process. The union did not file a second grievance. Safrit then filed a charge of discrimination with the EEOC. Subsequently, she filed the present complaint, alleging that Cone Mills violated Title VII by discriminating against her based on her sex. At the time the complaint was filed, Safrit was still employed at the plant. The plant has since closed.

Section XX of the CBA specifically stated that the company and the union "agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability.... The parties further agreed [sic] that they will abide by all the requirements of Title VII of

the Civil Rights Act of 1964." Section XX further noted, "Unresolved grievances arising under this Section are the proper subjects for arbitration." Cone Mills urged the district court to dismiss the case, arguing that the CBA clearly and unmistakably permitted arbitration as the sole remedy for alleged violations of Title VII.

II.

The district court granted summary judgment for Cone Mills. It stated that the Fourth Circuit allows a Collective Bargaining Agreement negotiated by a union on behalf of an employee to validly waive an employee's statutory rights to a federal forum. *See Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 321 (4th Cir.1999). The district court also noted that the Supreme Court does not preclude a waiver of the right to a federal forum in a collective bargaining agreement if it is done in "clear and unmistakable" language. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998).

The district court recognized that this court has previously held that a "clear and unmistakable" waiver can occur in two ways. First, the agreement can contain an explicit arbitration clause in which the parties agree to submit to arbitration all federal causes of action arising out of employment. *See Carson v. Giant Food, Inc.*, 175 F.3d 325, 332 (4th Cir.1999). Second, a general clause requiring arbitration under the agreement can be coupled with a provision which makes "unmistakably clear that the discrimination statutes at issue are part of the agreement...." *Id.*

Here, Section XX of the CBA indubitably provides such a clear and unmistakable waiver. Indeed, it is hard to imagine a waiver that would be more definite or absolute. The parties agreed that they would "abide by all the requirements of Title VII" and that "[u]nresolved grievances

arising under this Section are the proper subjects for arbitration."

Safrit now argues that her good-faith compliance with the grievance provisions of the governing CBA should preserve her right to pursue claims in a federal forum, especially when the grievance process was inadequate to remedy the discriminatory treatment and when she herself had no control over the further processing of the complaint. But Safrit runs flat against binding Fourth Circuit case law on this point. We have already held, post-*Wright*, that a collectively bargained agreement to arbitrate a statutory discrimination claim is enforceable. *See Brown*, 183 F.3d at 321; *Carson*, 175 F.3d at 331. And the Supreme Court itself has recently acknowledged the continuing viability of arbitration claims in the employment context. *See Circuit City Stores, Inc. v. Adams*, No. 99-1379, 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001).

We are, of course, bound to apply our precedent on this point, and to respect the Supreme Court's most recent pronouncement on the subject of arbitration. An agreement to arbitrate statutory claims is part of the natural tradeoff that a union must make in exchange for other benefits. As Judge Widener wrote for the court in *Austin v. Owens-Brockway Glass Container, Inc.*, a "union has the right and duty to bargain for the terms and conditions of employment." *Austin*, 78 F.3d 875, 885 (4th Cir.1996). And since the right to arbitrate is a term or condition of employment, the union may bargain for this right as well. *See id.* (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957)). The collective bargaining process permits unions to waive the right to strike "and other rights protected under the National Labor Relations Act." *Id.* (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983)). Indeed, no reason exists for distinguishing between "a union bargaining away the right to strike and a union bargaining for the right to arbitrate."

Austin, 78 F.3d at 885. In both cases, the union and its members decide that the price of giving up the right to strike or the right to litigate is worth the benefits that they will receive in return.

To redact one clause from the CBA would in effect alter the agreement reached during the often-difficult collective bargaining process. And there is no claim that Safrit's union failed to adequately represent its members during the course of negotiations with Cone Mills or during the grievance process.

III.

For the foregoing reasons, the judgment of the district court is *AFFIRMED*.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA

Filed: Nov. 9, 1999

LORI A. SAFRIT,

Plaintiff,

v. 4:97CV00646

CONE MILLS,

Defendant.

MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Lori A. Safrit (Plaintiff) filed this suit alleging discrimination in violation of Title VII of the Civil Rights Act of 1964. The court was prepared to rule on Defendant's Motion to Dismiss but stayed the litigation pending a decision by the United States Supreme Court in *Wright v. Universal Maritime Serv. Corp.*, No. 96-2850 (4th Cir. July 29, 1997). The Supreme Court having ruled, this matter is again before the court on Defendant Cone Mills (Defendant) motion for summary judgment.[5] For the reasons stated herein, the court will grant Defendant's motion.

I. Facts

Plaintiff Lori A. Safrit is an employee at Defendant's Salisbury, North Carolina, plant. Plaintiff is a member of a

[5]Defendant filed a motion to dismiss. Based on Defendant's reliance on the Joint Affidavit attached to Defendant's Motion to Dismiss, the court has converted the motion into one for summary judgment.

union, UNITE, which negotiated a collective bargaining agreement (CBA) on her behalf with Defendant. The CBA provides a four-step grievance procedure to process any complaints and, if unresolved, a provision for arbitration. In Section XX of the CBA, Defendant agrees not to discriminate against any employee because of gender and to abide by Title VII of the Civil Rights Act of 1964. Section XX of the CBA requires that any grievance against Defendant for discrimination must be submitted to arbitration.

Plaintiff became a fixer trainee at Defendant's plant in Salisbury, North Carolina. Plaintiff alleges that she received insufficient training from Defendant as compared to the training of male employees. Plaintiff claims that comments were made to her about women trying to be fixers, and she was never offered a permanent position as fixer.

Plaintiff raised her complaints through the authorized grievance procedures provided by the CBA. Plaintiff's complaint proceeded through the fourth step of the grievance process, at which time Defendant agreed to provide Plaintiff additional time to train as a fixer. Plaintiff accepted Defendant's offer and did not pursue her grievance through arbitration.

Defendant wanted to move Plaintiff to a different shift to complete her training and fill a vacant fixer position. Plaintiff alleges that the discriminatory treatment continued. She did not continue in the fixer training program. After consultation with the union, Plaintiff sought relief under Title VII.

Defendant moved for summary judgment, arguing that the court has no jurisdiction to hear the case because Plaintiff's claim must be arbitrated as provided for by the CBA. Plaintiff claims she submitted her claim through the grievance procedures of the CBA, but the settlement she

reached with the Defendant failed. Plaintiff alleges that she was unsure about what steps to take once the discrimination continued. After consultation with the union, she sought relief in this court. Plaintiff argues that she should not be required to pursue arbitration when the grievance procedure has failed her.

II. Discussion

Summary judgment is appropriate in those cases where it is established through pleadings, affidavits, depositions, and other discovery documents that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2509-10 (1986). Thus, it is the burden of the moving party to show the court that no material factual issues exist for trial. The court must draw any permissible inference from the underlying facts as established in the record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57 (1986); *Pulliam Inv. Co. v. Cameo Prop.*, 810 F. 2d 1282, 1286 (4th Cir. 1987). "The court can determine that a trial is unnecessary only if either the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." *Mitchell v. Data Gen. Corp.*, 12 F. 3d 1310, 1315-16 (4th Cir. 1993).

The Fourth Circuit has held that a collective bargaining agreement negotiated by a union on behalf of an employee can validly waive an employee's statutory rights to a federal forum and subject those claims to arbitration. *Brown v. ABF Freight Sys., Inc.*, 183 F. 3d 319, 321 (4th Cir. 1999)(citations omitted). The United States Supreme Court has required that a waiver of the right to a federal forum in a collective bargaining agreement must be done in "clear and unmistakable" language. *Wright v. Universal Maritime Serv.*

Corp., 525 U.S. 70, __, 119 S.Ct. 391, 396 (1998). A "clear and unmistakable" waiver of an employee's statutory rights can occur in two ways. First, the agreement can contain an explicit arbitration clause in which the parties agree to submit any employment discrimination claim to arbitration. *Carson v. Giant Food, Inc.*, 175 F. 3d 325, 332 (4th Cir. 1999). Second, the agreement can have a provision which makes "unmistakably clear that the discrimination statutes at issue are part of the agreement . . . ." Id.

Section XX of the CBA negotiated between Plaintiff's union and Defendant clearly and unmistakably provides that any claim of gender discrimination is subject to arbitration. This satisfies both the first and second means of finding a valid waiver; therefore, Plaintiff's claim must be submitted to arbitration.

First, Plaintiff argues that she can bring this suit because the arbitration process failed when Defendant did not comply with the settlement. Any allegations of continued discrimination after the settlement would constitute new grievances Plaintiff had against Defendant. Under the clear terms of the CBA, Plaintiff's new grievances must follow the procedures set out in the CBA. Since Plaintiff did not initiate the grievance procedure for her new complaints, she cannot argue that the arbitration process has failed her.

Second, Plaintiff claims there was no clear law as to whether she had to proceed further with arbitration and time was running out for her to file a claim with the EEOC. At the time of the events Plaintiff complains of, the Supreme Court had decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991), which held that agreements to arbitrate statutory claims are enforceable.

Third, Plaintiff alleges that she sought the advice of her union, and the union told her to pursue her remedies through Title VII. She cites *Smith v. United Parcel Serv.*,

Inc., 947 F. Supp. 190 (D.Md. 1996) in support of her claim. *Smith* involved a union's breach of its duty of fair representation. *Id.* at 194

The Supreme Court has held that an employee can bring a civil action without first pursuing arbitration under a collective bargaining agreement when the employee's interests are not fairly represented by the union. *DelCostello v. Teamsters*, 462 U.S. 151, 164, 103 S.Ct. 2281, 2290-91 (1983). A union breaches its duty of fair representation when its conduct toward a member of the collective bargaining unit it "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916 (1967). Where the plaintiff alleges that a breach occurs but does not support it with a specific showing of a lack of good faith, the plaintiff has not proven a breach. *Brown v. Trans World Airlines*, 746 F. 2d 1354, 1359 (8th Cir. 1984).

Plaintiff did not allege in her pleadings or briefs that the union breached its duty or acted in an arbitrary or discriminatory manner toward her. In fact, Plaintiff stated that "[s]he went to her union and together they decided she should proceed to seek a remedy under Title VII rather than pursue further grievances." Pl.'s Resp. Def's Mot. Dismiss at 5. Even if Plaintiff alleged a breach of the union's duty, she has not set forth sufficient facts to establish a breach. Without allegations or facts establishing that the union acted arbitrarily or in bad faith, Plaintiff has not prove that the union breached its duty of fair representation.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 9th day of November 1999.

/S/ William L. Osteen

United States District Judge

Supreme Court, U.S.
FILED
SEP 27 2001
OFFICE OF THE CLERK

No. 01-359

IN THE

Supreme Court of the United States

LORI A. SAFRIT,

Petitioner,

v.

CONE MILLS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JAMES M. POWELL
D. ROSS HAMILTON, JR.*
HAYNSWORTH BALDWIN JOHNSON & GREAVES LLC
Attorneys for Respondent
P.O. Box 13310
Greensboro, NC 27415-3310
(336) 375-9737

* *Counsel of Record*

169668

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Can a plaintiff proceed to federal court on a Title VII claim of gender discrimination in the face of a governing collective bargaining agreement that clearly binds her claim to arbitration?

LIST OF INTERESTED PARTIES

The parties and counsel of record are properly identified in the caption. Cone Mills Corporation is a publicly held company. It does not have a separate parent company, and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
I. Former Collective Bargaining Agreement	1
Section III – Adjustment Of Grievances	1
Section IV – Arbitration	2
Section XX – Non-Discrimination	3
II. Petitioner's Gender Discrimination Allegations and Grievance	4
Reasons for Denying the Writ	6
I. Petitioner's Petition Argues That The Fourth Circuit Incorrectly Interpreted The Agreement To Require Arbitration Of Petitioner's Claim. This Claim Of Contract Interpretation Error Was Not Raised Below, Does Not Require Supreme Court Clarification, And Suggests This Is Not The Proper Case For Review Of The Question Presented.	6

Contents

Page

II. The Fourth Circuit Has Adopted A Very Narrow And Explicit Rule For The Enforcement Of Collectively Bargained Agreements To Arbitrate Statutory Discrimination Claims. 9

Conclusion 11

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 7

Brown v. ABF Freight Systems, Inc., 183 F.3d 319 (4th Cir. 1999) 9, 10

Carson v. Giant Food, Inc., 175 F.3d 325 (4th Cir. 1999) 9, 10

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 7

EEOC v. Waffle House, 193 F.3d 805 (4th Cir. 1999), *petition for writ of certiorari granted*, 149 L. Ed. 2d 344, 121 S. Ct. 1401 (2001) 5

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) 8

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 8

Wright v. Universal Maritime Service Corporation, 525 U.S. 70 (1998) 7, 8, 9, 10

Youakim v. Miller, 425 U.S. 231 (1976) 7

STATEMENT OF THE CASE

I. Former Collective Bargaining Agreement

Petitioner was employed by Cone Mills Corporation, [hereinafter "Cone Mills"], at its manufacturing plant in Salisbury, North Carolina. Petitioner was a dues paying member of the United Needletrades, Industrial and Textile Employees Union [f/k/a Amalgamated Clothing and Textile Workers Union], and Local 1584, [hereinafter collectively referred to as the "Union"], which represented her in a bargaining unit of approximately 500 Salisbury plant employees. Cone Mills and the Union had negotiated a collective bargaining agreement, (hereinafter "Agreement"), which was in force for all relevant time periods of Petitioner's allegations.

The Agreement clearly identifies Petitioner's claim of gender discrimination in violation of Title VII as one of the specific grievances that the parties agree to arbitrate. First, Section III of the Agreement states that all disputes arising under the Agreement will be handled pursuant to the grievance steps outlined in that section. Second, Cone Mills and the Union expressly agree in Sections III and IV to arbitrate "only those grievances involving issues specifically mentioned as being arbitrable in the succeeding sections of the Agreement." Sections III and IV state in pertinent part:

SECTION III – ADJUSTMENT OF GRIEVANCES

> Grievances arising out of the operation of this Agreement will be handled in the following manner:
>
> . . .

(d) Upon receipt, in writing, of the Manager's decision at the fourth (4th) step of the grievance procedure, the Union shall have ten (10) calendar days to submit the matter to arbitration in accordance with the terms of Section IV – Arbitration, of this Agreement. . . .

(e) A grievance involving specific issues as expressly stated in various sections of this Agreement may be submitted to arbitration as provided in Section IV if it has not been satisfactorily settled in the final grievance conference. Only those grievances involving issues specifically mentioned as being arbitrable in the succeeding sections of the Agreement may be arbitrated. . . .

SECTION IV – ARBITRATION

(a) Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Section III, and which involves a dispute subject to arbitration under this Agreement, . . . , may be submitted to arbitration upon the written request of the Union . . .

(c) The award of an arbitrator so selected upon any dispute subject to arbitration as herein provided shall be final and binding upon all parties to this Agreement, and upon the aggrieved employee or employees. . . .

Twenty-two sections of the Agreement follow the arbitration provision in Section IV, and Cone Mills and the Union specifically express their intent to arbitrate unresolved

grievances arising under all or part of twelve sections of the Agreement. When the parties intended to arbitrate all disputes arising under a particular section of the Agreement, the Agreement provided: "Arbitration. Unresolved grievances arising under this Section are the proper subjects for arbitration." If the parties intended to limit the types of disputes in a particular section that is subject to arbitration, the Agreement properly described the grievances which "are proper subjects for arbitration."

Section XX of the Agreement specifically identifies a claim of gender discrimination in violation of Title VII as a grievance that must be submitted to arbitration. This section of the Agreement prohibits gender discrimination and requires the Company's compliance with all requirements of Title VII. Further, Cone Mills and the Union expressly identify any unresolved grievance arising under this Section XX as one of the specific disputes that must be resolved through final and binding arbitration under Section IV.

SECTION XX – NON-DISCRIMINATION

> The Company and Union agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability. This includes but is not limited to, all phases of employment, benefits, hiring, placement, rates of pay, upgrading, transfer, layoff, demotion, and termination. The parties further agreed that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964 and Executive Orders 11246 and 11375.
>
> Arbitration. Unresolved grievances arising under this Section are the proper subjects for arbitration.

II. Petitioner's Gender Discrimination Allegations and Grievance

In November 1994, Petitioner was awarded a Sulzer Fixer Trainee position through the job bidding process. (Pet. Aff. ¶ 2)[1] Petitioner complains that during her training period for the fixer position, she was denied sufficient training for the job and that the Company hired a male for a fixer position rather than offer her the position. (Pet. Aff. ¶¶ 5-9) Petitioner discussed the alleged discrimination with the President of the Local Union, Cindy Chattin, and that based upon Chattin's advice, Petitioner initiated a grievance in June 1995 alleging that she was denied training opportunities equal to her male co-workers. (Pet. Aff. ¶¶ 12-13) (Company Joint Affidavit, ¶ 6)[2]

Petitioner's grievance was reduced to writing by the union shop committee on June 16, 1995, as Grievance No. 18/95 signed by Ms. Chattin, and asked that the Company stop discriminating against Petitioner. (Co. Aff. ¶ 6, Ex. B) At the fourth step of the grievance procedure, Cone Mills agreed to provide Petitioner with additional training time beyond the normal six month period so that she could become a qualified fixer. (Pet. Aff. ¶ 14) (Co. Aff. ¶ 6) The offer to extend Petitioner's training period settled the grievance as it was not pursued through arbitration. (Co. Aff ¶ 6)

Petitioner was informed on or about October 4, 1995 that she would be transferred to an off-shift to complete her training and fill a vacant fixer position. (Pet. Aff. ¶¶ 17, 20)

---

1. Petitioner's Affidavit hereinafter abbreviated "Pet. Aff."

2. Company Joint Affidavit is hereinafter abbreviated "Co. Aff."

(Co. Aff. ¶ 7) At a meeting attended by Ms. Chattin and a union shop steward on October 16, 1995, Petitioner informed the Company that she would remove herself from the training program rather than change shifts. (Co. Aff. ¶ 7) (Pet. Aff. ¶ 20) Petitioner was then removed from the training program and placed in another job. (Co. Aff. ¶ 7) Petitioner and a union representative did not initiate a grievance over the circumstances leading up to her removal from the training program. (Co. Aff. ¶ 8) Petitioner filed a charge of discrimination with the EEOC on October 5, 1995. (Pet. Aff., Ex.) At the time she filed this suit on June 16, 1997, Petitioner was still employed at Cone Mills' Salisbury plant. The plant has since closed.

There is no allegation that the Union ever refused a request by Petitioner that it pursue a gender discrimination grievance on her behalf. As stated above, the Union did pursue a gender discrimination grievance on her behalf when requested by Petitioner in June, 1995. Furthermore, there is no allegation that the Union even dissuaded her from seeking to initiate a second grievance, or that the Union even advised her to file suit as opposed to a second grievance at the time she declined to change shifts and was removed from the fixer training program. Instead, Petitioner states in her affidavit that she informed Chattin at that point of *her own* decision to file a complaint with the Equal Employment Opportunity Commission, and that Chattin "concurred" with Petitioner's decision. (Pet. Aff. ¶¶ 22-23) [3] When the EEOC investigation

3. The existence of an agreement to arbitrate a Title VII claim does not preclude the EEOC investigation of a discrimination charge and pursuit in court of equitable remedies on behalf of a charging party. *EEOC v. Waffle House*, 193 F.3d 805 (4th Cir. 1999), *petition for writ of certiorari granted*, 149 L. Ed. 2d 344, 121 S. Ct. 1401 (2001).

showed little progress, Petitioner states that Chattin then referred her to an attorney. (Pet. Aff. ¶ 24) Petitioner complains that Chattin did not advise her at that point to re-submit the matter by grievance, (Pet. Aff. ¶ 25), but at this point the time frame for initiating a grievance under Section III would necessarily have expired.[4]

REASONS FOR DENYING THE WRIT

I. PETITIONER'S PETITION ARGUES THAT THE FOURTH CIRCUIT INCORRECTLY INTERPRETED THE AGREEMENT TO REQUIRE ARBITRATION OF PETITIONER'S CLAIM. THIS CLAIM OF CONTRACT INTERPRETATION ERROR WAS NOT RAISED BELOW, DOES NOT REQUIRE SUPREME COURT CLARIFICATION, AND SUGGESTS THIS IS NOT THE PROPER CASE FOR REVIEW OF THE QUESTION PRESENTED.

While conceding that the Agreement incorporates all of Title VII's requirements, Petitioner for the first time states in her petition that the Agreement "permits", but does not "require" either explicitly or at all, arbitration of her Title VII claim, and that the Fourth Circuit misinterpreted the Agreement to compel arbitration of her claim. (Pet. Petition p. 15) To the extent that the lower courts misinterpreted the provisions of the Agreement as Petitioner now asserts, (which Cone Mills disputes), Petitioner's argument suggests that this is not an appropriate case for resolving the conflict in the decisions among the circuit courts as stated in the Question Presented in the Petition for a Writ of Certiorari.

---

4. Section III of the Agreement places a ten day time limit for the employee to initiate a grievance.

At no time throughout the lower court proceedings did Petitioner assert that the Agreement could be properly read to "permit" but not "require" arbitration of her Title VII claim.[5] Because this argument was not raised by Petitioner in the lower courts, it is not grounds for review. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in the court of appeals is not properly before us).

Furthermore, Petitioner's claim of contract interpretation error is not a previously unresolved issue that requires the review and guidance of this Court. Petitioner erroneously claims that further guidance from this Court is necessary to establish the boundaries of a "particularly clear" waiver under *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998). (Pet. Petition p. 15) To the contrary, *Wright* referred to several prior decisions of the Court which define the "clear and unmistakable" standard for analyzing the text of a collective bargaining agreement. *Id.*, at 79-80; citing:

---

5. The arguments raised by Petitioner to the district court are summarized in the district court memorandum opinion. (Pet. Petition App. pp. 9a-10a). In her brief to the Fourth Circuit, Petitioner argued that a clear and unmistakable agreement did not exist because the individual employee did not understand and was not informed of the waiver, because the individual employee had no control over the decision to pursue arbitration and because the potential remedies were limited. Petitioner also argued that her good faith attempts to pursue the grievance process made it inappropriate to deny her a federal forum. The Fourth Circuit rejected these arguments on the basis of its precedent discussed *infra*. (Pet. Petition App. p. 4a)

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 707-710 (1983) (waivers of a statutory right can occur if expressed clearly and unmistakably within the contract's provisions); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279-284 (1956) (the contract as a whole should be examined when determining whether the agreement has expressly waived a statutory right) (additional citations omitted). Petitioner's argument is nothing more than the Fourth Circuit erred by focusing only on the language of Section XX and failing to look at the Agreement as a whole. Apparently, Petitioner argues that had the Agreement been construed as a whole, the Court would have found that arbitration is permissive not mandatory. The petition should not be granted for the purposes of determining if the Fourth Circuit correctly interpreted the Agreement.

Finally, Petitioner's contention that the Agreement permits, but does not require, arbitration of her Title VII claim suggests that this is not a proper case for the Court to decide the issue left undecided in *Wright*. In *Wright*, the Court left unresolved the question of the validity of union negotiated agreement to arbitrate statutory claims, because there was no clear and unmistakable agreement to arbitrate the discrimination claim in that case. *Wright*, 525 U.S. at 77. If, as the petition suggests, the Agreement does not contain a clear agreement to arbitrate, the Court will once again not reach the question left undecided in *Wright*. In these circumstances, a grant of the petition will not resolve the split among the circuits identified by Petitioner and should, therefore, be denied.

II. THE FOURTH CIRCUIT HAS ADOPTED A VERY NARROW AND EXPLICIT RULE FOR THE ENFORCEMENT OF COLLECTIVELY BARGAINED AGREEMENTS TO ARBITRATE STATUTORY DISCRIMINATION CLAIMS.

In the wake the Court's decision in *Wright*, *supra*, the Fourth Circuit has identified two narrow means for the parties to a collective bargaining agreement to draft express language that satisfies the clear and unmistakable standard and creates an enforceable agreement to arbitrate a statutory discrimination claim. The union and the employer can draft an arbitration clause that explicitly agrees to submit to arbitration all federal causes of action arising out of the employment relationship. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331-32 (4th Cir. 1999). Only an arbitration clause that is drafted with this particular clarity will suffice to bind Title VII claims to arbitration. *Id.* at 332. Alternatively, the union and the employer must explicitly incorporate the statutory anti-discrimination requirements into their collective bargaining agreement, coupled with a provision to arbitrate all disputes arising under the agreement. *Id.* A contract provision that merely expresses an agreement not to violate federal antidiscrimination law is inadequate, even if the provision identifies the discrimination statute by name. *Brown v. ABF Freight Systems, Inc.*, 183 F.3d 319, 322 (4th Cir. 1999). Instead, the language of the contract must be drafted in such a manner that it incorporates, "*in toto*, the anti-discrimination statutes that prohibit those acts." *Id.*

As a result and contrary to Petitioner's petition, unions and employers are not "uncertain as to the legal significance of the countless collective bargaining agreements negotiated

each year." (Pet. Petition p. 16) Only the unique and rare collective bargaining agreement drafted with an arbitration clause that explicitly agrees to arbitrate statutory discrimination claims or in a manner that incorporates the discrimination statute, *in toto*, will contain a binding arbitration agreement in the Fourth Circuit. It is clear that run of the mill agreements to submit all disputes to grievance and arbitration coupled with an agreement to abide by the discrimination laws will not require arbitration of a statutory discrimination claim. Furthermore, under the Fourth Circuit's standards, the parties negotiating a collective bargaining agreement will not stumble into an enforceable agreement to arbitrate statutory discrimination claims. Instead, they can be certain that they are not forming a binding agreement to arbitrate unless they agree to follow the narrow means and draft the very explicit language required by *Carson*, *supra* and *Brown*, *supra*.

There is no uncertainty between Cone Mills and the Union regarding their intent to provide for a mechanism for the grievance and arbitration of Petitioner's gender discrimination claims. The Union filed a grievance on her behalf alleging gender discrimination as prohibited in Section XX of the Agreement, and successfully negotiated at the fourth step of the grievance procedure a resolution of her grievance that gave her more time to complete the training program. Furthermore, there is no allegation that the Union ever refused or even dissuaded Petitioner from initiating another discrimination grievance. In the petition, Petitioner contends that this case is just like *Wright*, in that the Fourth Circuit gave the contract a meaning the Union never intended. In *Wright*, there was evidence presented that the union never intended for plaintiff's disability claim to be subject to arbitration. In this case, however, there is no such evidence

presented by or on behalf of the Union. In fact, the explicit language of the Agreement and the conduct of the parties with regard to Petitioner's June 1995 discrimination grievance demonstrate otherwise.

Therefore, in light of the very narrow and explicit requirements of the Fourth Circuit for drafting an enforceable agreement to arbitrate statutory discrimination claims, this case does not present an unresolved issue whose uncertainty undermines the integrity of the collective bargaining process as claimed in Petitioner's petition. To the contrary, the Fourth Circuit has explicitly stated a very narrow rule for the enforcement of agreements to arbitrate statutory discrimination claims that will only be met if the parties chose to do so.

CONCLUSION

For the reasons stated, the petition for a writ or certiorari should be denied.

Respectfully submitted,

JAMES M. POWELL
D. ROSS HAMILTON, JR.*
HAYNSWORTH BALDWIN JOHNSON
& GREAVES LLC
Attorneys for Respondent
P.O. Box 13310
Greensboro, NC 27415-3310
(336) 375-9737

* *Counsel of Record*

(3)

Supreme Court, U.S.
FILED
OCT 16 2001
OFFICE OF THE CLERK

No. 01-359

In The
SUPREME COURT OF THE UNITED STATES

LORI A. SAFRIT,
Petitioner,
v.
CONE MILLS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

NANCY R. GAINES*
P.O. Box 4118
121 W. Council Street
Salisbury, NC 28145-4118
(704) 633-1723

ERIC SCHNAPPER
University of Washington School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Paul Alan Levy
Public Citizen Litigation Group
1600-20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

*Counsel of Record

ARGUMENT

This case presents the most recent application of the Fourth Circuit's much criticized decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F. 3d 875 (4th Cir. 1995), *cert. denied* 519 U.S. 980 (1996). As we noted in the Petition, the holding in *Austin* has been explicitly rejected by seven other circuits. Respondent does not deny the existence of this widely noted inter-circuit conflict, and does not question its importance.

The proceedings below also raised a significant question about the meaning of this Court's decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). Since *Carson v. Giant Food, Inc.*, 175 F. 3d 325 (4th Cir. 1999), the Fourth Circuit has followed a somewhat idiosyncratic interpretation of *Wright*. As respondent correctly observes, if an employee seeks judicial relief from unlawful discrimination, an employer in the Fourth Circuit can defeat that claim by showing that an applicable collective bargaining agreement "incorporates, '*in toto*, the anti-discrimination statutes that prohibit those acts.'" (Br. Opp. 9[1]22, *quoting Brown v. ABF Freight Systems, Inc.*, 183 F. 3d 319, 322 (4th Cir. 1999).

This "incorporation *in toto*" rule is well established Fourth Circuit law. "If [a] provision . . . makes it unmistakably clear that the discrimination statutes at issue are part of the [collective bargaining] agreement, employees will be bound to arbitrate their federal claims." *Carson v. Giant Food, Inc.*, 175 F. 3d 325, 331 (4th Cir. 1999); *Brown v. ABF Freight Systems,*

---

[1]See Br. Opp. 10 (a "collective bargaining agreement drafted . . . in a manner that incorporates the discrimination statute, in toto, will contain a binding arbitration agreement in the Fourth Circuit.") A third passage in the Brief in Opposition, on the other hand, suggests that in addition to incorporation there must also be "a provision to arbitrate all disputes arising under the agreement." (Br.Opp. 9).

Inc., 183 F. 3d 319, 321 (4th Cir. 1999)(even where the arbitration clause is "not so clear", judicial enforcement is precluded if it is clear "that the discrimination statutes at issue are part of the agreement"); *Robinson v. Healthtex, Incorporated*, 2000 WL 691053 *3 (4th Cir.)(*Wright* requirement met by showing the parties' "intent to incorporate in their entirety the discrimination statutes at issue").

Even where there is no express requirement that all employment disputes be submitted to arbitration, the incorporation of a particular federal law into the collective bargaining agreement can operate in the Fourth Circuit to strip workers of their right to judicial enforcement.[2] In the proceedings below the express incorporation of Title VII into the CBA in question was held sufficient by itself to preclude this action. (Pet. App. 9a)[3].

---

[2]The Fourth Circuit's standard has become increasingly broad. *Carson* itself contained one passage suggesting that the CBA would also need to have a "[g]eneral arbitration clause", "such as those referring to 'all disputes' or 'all disputes concerning the interpretation of the agreement.'" 175 F. 3d at 331. Next *Brown* referred to an arbitration clause that was "not so clear", without explaining whether it meant that an unclear arbitration clause also required incorporation, or that an incorporation also required an unclear arbitration clause, or perhaps both. 183 F. 3d at 321. *Robinson* quoted the "not so clear" phrase from *Brown*, but appeared to regard incorporation *vel non* as the dispositive issue.

In the litigation below the district court construed *Carson* to only require incorporation. Pet. App. 9a. The court of appeals referred to "a general clause requiring arbitration under the agreement". (Pet. App. 3a). But in holding that the CBA waived petitioner's claims, however, the court of appeals noted that the union was *not* required under the CBA to seek arbitration, explaining instead that arbitration was merely "the exclusive option" of the union. (Pet. App. 2a).

[3]Under controlling Fourth Circuit authority it was apparently irrelevant that the CBA stated that unresolved grievances regarding alleged violations

In the court of appeals we objected to the Fourth Circuit's interpretation of *Wright*. Respondent in the court below correctly described that argument as raising a dispute about the legal "standards" to be applied under *Wright*[4]. In this Court, however, respondent seeks to characterize this issue as a dispute of fact. (R.Br. 6-7). That is wrong for two reasons. First, there is no dispute that the CBA in this case does indeed explicitly incorporate Title VII; it is the legal significance of that incorporation that is at issue. Second, if the application of Wright were indeed a factual issue, this Court in *Wright* would have remanded that question to the district court; instead the Court itself resolved whether the CBA in that case met the "clear and unmistakable waiver" standard.[5]

(3) We urge that certiorari should be granted because the rule in *Austin* and its progeny conflicts with this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and because the incorporation doctrine in *Carson* and its

---

of Title VII were a "proper" subject for arbitration rather than a "mandatory" subject for arbitration. See Petition, p. 3 n. 1.

[4]We urged that the mere incorporation of Title VII into a CBA was insufficient under *Wright*, and that this Court's decision required that a CBA also contain a provision stating that employees were "giving up their federal forum." (Brief of Appellant, No. 99-2677, p. 10.) Respondent insisted that the Fourth Circuit's earlier decisions in *Brown* and *Carson* had held that no such express statement was necessary. (Brief of Defendant-Appellee, p. 16)("[Appellant] would require an express statement to the employees that the 'judicial forum' is waived. . . . Plaintiff advances this self-serving suggestion for the obvious reason that the Agreement in this case clearly meets the standards adopted in *Carson* and *Brown* . . . . [A]bsent an *en banc* decision by this court to reverse *Carson* and *Brown*, this argument should be rejected.")

[5]*Wright*, 525 U.S. at 81 ("we do not find a clear and unmistakable waiver"), 82 ("We hold that the collective bargaining agreement in this case does not contain a clear and unmistakable waiver.")

progeny conflicts with this Court's decision in *Wright*. Respondent objects that the possible existence of the second legal error should preclude consideration of the first. (Br. Opp. 6-7).

That contention is unsound. This is a not a situation in which a lower court decision rests on two independent grounds, only one of which was erroneous, but a case in which a single ground (dismissal of the complaint because of the CBA) is tainted by two distinct legal errors (the *Austin* rule and the incorporation doctrine). The existence of a multiplicity of legal errors has never been thought to insulate an otherwise certworthy issue from review by this Court. Were that the case, appellate courts would have a perverse incentive to commit additional error. This Court's criteria for granting review are not limited to appellate opinions which conflict with only a *single* decision of this Court, but include cases in which a court of appeals "has decided a federal question in a way that conflicts with applicable *decisions* of this Court." Sup. Ct. Rule 10(c)(Emphasis added).

The existence of a *Wright* violation would not preclude this Court from also resolving the *Alexander* question; the decisions of this Court frequently correct several different errors in a lower court decision[6]. The Court might also elect to first address the *Alexander* issue, without reaching the *Wright* question. The Court, moreover, has the discretion to reframe the Question Presented to limit it to the *Alexander* issue.

---

[6] *Lewis v. Lewis & Clark Marine, Inc.*, 121 S.Ct. 993 (2001); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996); *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

NANCY R. GAINES*
P.O. Box 4118
121 W. Council Street
Salisbury, NC 28145-4118
(704) 633-1723

PAUL ALAN LEVY
Public Citizen Litigation Group
1600 20th St., N.W.
Washington, D.C. 20009
(202) 588-1000

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioner

*Counsel of Record